Supreme Court, U.S.
FILED
MAR 14 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1551

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ALAN J. KARCHER,

Appellant,

v.

JEFFREY MAY, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, AMICUS CURIAE, IN SUPPORT OF APPELLANT

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INTEREST OF AMICUS CURIAE

The Catholic League for Religious and Civil Rights (hereinafter League) is a voluntary non-profit organization dedicated to the right to religious freedom and the right to life of all, born or pre-born. The League has had a long-standing interest in preventing the Establishment Clause from being interpreted in such an overly expansive fashion that religious institutions, individuals and values are not allowed to thrive. To this end the League has filed amicus curiae briefs before this Court in its most recent considerations of the Establishment Clause in *Corporation of the Presiding Bishop v. Amos*, Nos. 86-179 and 86-1401 and *Edwards v. Aguillard*, No. 85-1513. This brief is another expression of this interest.

SUMMARY OF ARGUMENT

Prior to the court of appeals' decision to affirm the district court's ruling holding the New Jersey moment of silence statute unconstitutional on the basis of absence of secular purpose, one commentator described the district court's decision as a results-oriented ruling "in search of a constitutional foundation." W. Valente, *New Jersey's School Silent Contemplation Statute — Suspect and Unconstitutional,* 15 Education Law Reporter 447, 457 (West 1984). While the court of appeals confirmed the truth of this commentator's observations concerning the weakness of the district court's decision in its reversal of the district court's conclusions that the New Jersey moment of silence statute had the primary effect of advancing religion and excessively entangled the state in religious affairs, the court of appeals erroneously failed to reverse the district court's similarly flawed conclusion that the statute lacked a secular purpose.

The first difficulty with the court of appeals' ruling is that its deferral to the district court's factual analysis endorsed a judicial examination of the legislature's secular purpose which was both improperly exacting and reliant upon questionable evidence. In rejecting the district court's analysis dissenting court of appeals Judge Becker recognized that the evidence utilized by the district court in reaching its conclusion of absence of secular purpose was "equivocal at best, and much of it may be irrelevant." *May v. Cooperman,* 780 F.2d 240, 265 (3d Cir. 1985) (Becker, J., dissenting), *juris. postponed sub nom., Karcher v. May,* 55 U.S.L.W. 3512 (U.S. January 27, 1987) (No. 85-1551). In addition, Judge Becker properly noted that "[t]he single unambiguous piece of evidence — the face of the statute itself — attests to the secular motives of the legislators." *Id.* The district court's use of questionable evidence and analysis was contrary to the seemingly more usual approach to the consideration of secular purpose under the Establishment Clause set out in Justice O'Connor's concurring opinion in *Wallace v. Jaffree,* 472 U.S. 38, 74-75 (1985) (O'Connor, J., concurring in the judgment). This

approach would "find an improper purpose behind [a moment of silence] statute only if the statute on its face, in its official legislative history, or in its interpretation by responsible administrative agencies suggests it has the primary purpose of endorsing prayer." *Id.* at 75.

The court of appeals also construed the concept of secular purpose in an inappropriately narrow fashion by failing to recognize religious accommodation as a permissible secular purpose. This action seems contrary to the various opinions issued by this Court in *Wallace v. Jaffree,* 472 U.S. 38 (1985), which suggest that a moment of silence statute would be upheld if it did not encourage prayer over other possible activities. Indeed, this Court has long recognized the permissibility of government action to accommodate religion under the Establishment Clause. A requirement of a secular purpose independent of such accommodation appears inconsistent with the traditional allowance of such accommodations. Further, even if an accommodation's permissibility turned on its elimination of a government created obstacle to religious exercise, it is clear that such an obstacle is eliminated in this case. As in the "released time" program held constitutional in *Zorach v. Clauson,* 343 U.S. 306, 311-315 (1952), the moment of silence statute permissibly adjusts the schedule of public events to meet sectarian needs. *See Wallace v. Jaffree,* 472 U.S. at 73-74 n.2 (O'Connor, J., concurring). In the case of such an accommodation, "[i]t is disingenuous to look for a purely secular motive when the manifest objective of a statute is to facilitate the free exercise of religion by lifting a government-imposed burden." *Id.* at 83. Thus, even if New Jersey's proffered transition to the school day rationale for the moment of silence law is rejected, the statute clearly has legitimate secular purpose of accommodation of religious exercise.

ARGUMENT

THE NEW JERSEY MOMENT OF SILENCE STATUTE DOES NOT LACK A SECULAR PURPOSE.

Prior to the court of appeals' decision to affirm the district court's ruling holding the New Jersey moment of silence statute unconstitutional on the basis of absence of secular purpose, one commentator described the district court's decision as a results oriented ruling "in search of a constitutional foundation." W. Valente, *New Jersey's School Silent Contemplation Statute — Suspect and Unconstitutional,* 15 Education Law Reporter 447, 457 (West 1984) (hereinafter *Valente*). The court of appeals' reversal of the district court's conclusions that the New Jersey moment of silence statute had the primary effect of advancing religion and excessively entangled the state in religious affairs, clearly points toward the weakness of the district court's reasoning in this matter. *See May v. Cooperman,* 780 F.2d 240, 247-250 (3d Cir. 1985), *juris. postponed sub nom., Karcher v. May,* 55 U.S.L.W. 3512 (U.S. January 27, 1987) (No. 85-1551). Unfortunately, the court of appeals failed to also reverse the district court's conclusion that the statute lacked a secular purpose.

Amicus sees two basic problems with the court of appeals' analysis. Initially, the court's deferral to the district court's factual analysis endorsed a judicial examination of the legislature's secular purpose which was both improperly exacting and reliant upon questionable evidence. Second, the court's failure to recognize some notion of religious accommodation as an appropriate secular purpose erroneously narrowed the concept of secular purpose recognized in this Court's decisions.

A. The Court of Appeals' Examination of the Moment of Silence Statute's Secular Purpose was Overly Exacting and Improperly Relied upon Questionable Evidence.

In his dissenting opinion in the court of appeals, Judge

Becker extensively criticized the district court's overly exacting approach to the issue of the moment of silence statute's secular purpose and the district court's use of questionable evidence in reaching its conclusion of absence of secular purpose. *See May v. Cooperman,* 780 F.2d 240, 261-265 (3d Cir. 1985) (Becker, J., dissenting), *juris. postponed sub nom., Karcher v. May,* 55 U.S.L.W. 3512 (U.S. January 27, 1987) (No. 85-1551). This evidence included testimony of witnesses present at legislative hearings, newspaper accounts of these hearings, evidence of the perceptions of various citizens and citizens groups about the legislature's purpose, expert testimony about the statute's pedagogical value and prior attempts to pass moment of silence legislation. *See id.* at 261. Judge Becker concluded that this evidence was "equivocal at best, and much of it may be irrelevant." *Id.* at 265. He went on to note that "[t]he single unambiguous piece of evidence — the face of the statute itself — attests to the secular motives of the legislators." *Id.* The weakness of the evidence supporting the district court's conclusion of absence of secular purpose was also extensively criticized by a commentator in his discussion of the district court's decision. *See Valente,* at 450-455.

Judge Becker's criticism of the district court's utilization of questionable evidence, as well as the overly exacting nature of its examination of the legislature's secular purpose, appears well supported by the analysis contained in Justice O'Connor's concurring opinion in *Wallace v. Jaffree,* 472 U.S. 38, 74-75 (1985) (O'Connor, J., concurring in the judgment). In that case, as in this case, the Court was confronted with the constitutionality of a moment of silence statute. Justice O'Connor stated:

> [T]he inquiry into the purpose of the legislature in enacting a moment of silence law should be deferential and limited. In determining whether the government intends a moment of silence statute to convey a message of endorsement or disapproval of religion, the court has no license to psychoanalyze the legislators. If the legislature expresses a plausible secular

> purpose for a moment of silence statute in either the text or the legislative history, or if the statute disclaims any intent to encourage prayer over alternatives during a moment of silence, then courts should generally defer to that stated intent. It is particularly troublesome to denigrate an express secular purpose due to post-enactment testimony by particular legislators or by interested persons who witnessed the drafting of the statute. Even if the text and official history of the statute express no secular purpose, the statute should be held to have an improper purpose only if it is beyond purview that endorsement of religion or a religious belief "was and is the law's reason for existence." Since there is arguably a secular pedagogical value to a moment of silence in public schools, court should find an improper purpose behind such a statute only if the statute on its face, in its official legislative history, or in its interpretation by a responsible administrative agency suggests it has the primary purpose of endorsing prayer.

472 U.S. at 74-75 (O'Connor, J., concurring in the judgment) (citations and footnotes omitted). Justice O'Connor's observations seem consonant with this Court's traditional approach to the secular purpose prong of the establishment clause test. Her analysis would clearly appear to preclude utilization of much of the evidence used by the district court in finding an absence of secular purpose in this case. Further, her observation that an improper purpose is only to be found if it is "beyond purview that endorsement of religion or a religious belief was and is the law's reason for existence" would appear to require the upholding of the New Jersey statute since neither the face of the statute, official legislative history nor interpretation by a responsible administrative agency suggest that the statute has the primary purpose of endorsing prayer. Indeed, the court of appeals found that the involved statute did not have the purpose of endorsing prayer. 780 F.2d at 252. Particularly in light of the intervenors' assertion of some secular pedagogical value to the moment of

silence legislation, the court of appeals' analysis appears incompatible with the proper judicial approach to the question of a legislature's secular purpose. Thus, the decision of the court of appeals must be reversed.

B. The Court of Appeals Improperly Failed to Recognize Religious Accommodation as a Permissible Secular Purpose.

The court of appeals' decision also construed the concept of secular purpose in an inappropriately narrow fashion. Even if one were to agree with the lower courts' rejection of the state's articulated transition to the school day purpose for the moment of silence statute, it would seem that accommodation of religious exercise would constitute an appropriate secular purpose for the statute. However, the court of appeals appears to have held that accommodation of religious exercise is not a permissible secular purpose, at least in the absence of a specific government created obstacle to such religious exercise. *See* 780 F.2d at 252-253.

The court of appeals' narrow construction of secular purpose appears initially to conflict with this Court's apparent willingness to find constitutional moment of silence statutes which do not encourage prayer over other possible activities. *See Wallace v. Jaffree,* 472 U.S. 38 (1985). The three dissenting justices in *Jaffree* would have upheld a statute which went beyond the New Jersey statute by describing prayer as a permissible activity during the moment of silence. *See* 472 U.S. at 84-90 (Burger, C.J., dissenting), 472 U.S. at 90-91 (White, J., dissenting), 472 U.S. at 91-114 (Rehnquist, J., dissenting). Justice O'Connor apparently would have found constitutional statutes like this one which did not endorse prayer over other activities, *See* 472 U.S. at 67-84 (O'Connor, J., concurring in the judgment), and Justice Powell appeared to generally agree with her view. *See* 472 U.S. at 62-63 n.2 (Powell, J., concurring). Even the majority opinion appeared to envision that a statute might be constitutional if it "merely [protected] every student's right to engage in voluntary prayer during an appropriate moment of silence during the school

day." 472 U.S. at 59. The majority emphasized that this type of protection was afforded by an earlier Alabama statute whose constitutionality was uncontested. *See id.* This earlier Alabama statute is quite similar to the New Jersey statute at issue in this case, since it also does not single out prayer as a preferred activity during the moment of silence.

Certainly the implication of the various opinions in *Wallace v. Jaffree* is that a statute which provides a moment of silence for silent meditation, without specifically encouraging prayer during that moment, will conform to the Establishment Clause. *See* 472 U.S. at 72-75 (O'Connor, J., concurring in the result). Thus, the appeals court's claim that the New Jersey statute lacks a secular purpose, even though it fails to specifically encourage prayer,[1] is unpersuasive.

Amicus submits that this apparent conflict between the court of appeals' decision and this Court's decision in *Wallace v. Jaffree* stems, in large measure, from the erroneous nature of the court of appeals' conclusion that the accommodation of religious exercise is not an independently permissible secular purpose for a governmental action. A government action to accommodate religion, especially in the context of a Free Exercise Clause violation, clearly is permissible. *See Hobbie v. Unemployment Appeals Commission*, 55 U.S.L.W. 4208, 4210 (U.S. February 25, 1987). In *Hobbie* this Court observed that: "This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Id.* In a case, such as this one, in which a government action accommodating religion neither has the primary effect of advancing religion nor excessively entangles the state in religious affairs, a requirement of a secular purpose independent of religious accommodation would appear inconsistent with the clear permissibility of such accommodation.

Even if it were held that religious accommodation might require elimination of a government created obstacle to religious exercise in order to constitute a legitimate secular

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[1] *See* 780 F.2d at 252.

purpose,[2] it is clear that such a purpose exists in this case. Unlike *Wallace v. Jaffree,* in which a moment of silence existed in Alabama schools prior to the enactment of the controverted statute, in the absence of the contested statute New Jersey has no moment of silence to begin the school day. This means that New Jersey students are in an analogous position to the students whose religious exercise was permissibly accommodated by released time provisions in *Zorach v. Clauson,* 343 U.S. 306, 311-315 (1952). The state established school schedule presented some obstacle to released time for religious classes in *Zorach* and also presents an obstacle for quiet prayer for students desiring it in the instant case. Neither religious exercise would probably have justified a judicially mandated Free Exercise Clause based exemption from the normal school schedule. However, *Zorach* appears to stand for the proposition that a state does not violate the Establishment Clause when it adjusts its public school schedule to eliminate obstacles to religious exercise contained in its school schedule. Justice O'Connor noted this fact in *Jaffree*

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[2] Some support for this rationale may be found in both the *Jaffree* majority opinion, 472 U.S. at 57-58 n. 45, and Justice O'Connor's concurring opinion, 472 U.S. at 81-84 (O'Connor, J., concurring in the judgment). Such a position is founded upon the idea that this type of accommodation furthers constitutionally protected free exercise of religion by eliminating the governmentally created obstacles to religious exercise which the Free Exercise Clause directly addresses. In the case of such an accommodation, Justice O'Connor has clearly noted that: "It is disingenuous to look for a purely secular motive when the manifest objective of the statute is to facilitate the free exercise of religion by lifting a government-imposed burden." *Id.* at 83.

While amicus agrees that religious accommodation laws of this type have a legitimate purpose, amicus also would note that this view may be inappropriately narrow. Government recognition of divergent religious customs, affairs and practices in various aspects of our public life might also be considered to evidence an appropriate secular purpose, while not necessarily lifting government-imposed burdens on religion. *See Lynch v. Donnelly,* 465 U.S. 668, 680, 681 (1984) (upholding government action creating Christmas display which had clear religious content as furthering secular purpose of recognizing religious origins of holiday). *Cf. Marsh v. Chambers,* 463 U.S. 783, 786, 795 (1983) (upholding a long-standing practice of starting legislative sessions with prayer in a case which did not resort to utilization of the tripartite Establishment Clause test).

when she stated: "[In *Zorach*] the Court stated that 'when the state encourages religious instruction . . . *by adjusting the schedule of public events to sectarian needs,* it follows the best of our traditions.' (emphasis added). When the State provides a moment of silence during which prayer may occur at the election of the student, it can be said to be adjusting the schedule of public events to sectarian needs." 472 U.S. at 73-74 n.2 (O'Connor, J., concurring in the judgment). Justice O'Connor also clearly noted that "[i]t is disingenuous to look for a purely secular motive when the manifest objective of a statute is to facilitate the free exercise of religion by lifting a government-imposed burden." *Id.* at 83. Accordingly, lifting a government imposed burden on religious exercise by the adjustment of the school schedule for a moment of silence has the legitimate secular purpose of permissibly accommodating religious exercise. Thus, even if New Jersey's proffered transition to the school day rationale for the moment of silence law is rejected, the statute clearly has the legitimate secular purpose of accommodation of religious exercise.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

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MARCH 13, 1987